Chapter 4

Child Victims in the Criminal Justice System

4.1 Introduction

The previous chapter reviewed empirical findings regarding the psycho-social needs of child victims. This evidence-based examination has been integrated with the normative human rights framework presented in Chapter 2. Together they create a multidisciplinary model which can be used to evaluate public responses to crimes against children. The current chapter utilizes the needs–rights model to examine the current legal responses to childhood victimization in adversarial criminal justice systems and their ability to meet the human rights and needs of child victims.

At first glance, the characteristics of the adversarial criminal justice process in Western societies seem to overlook many of the needs–rights of child victims. Their rehabilitation and best interests, while possibly in the background, are not assigned high priority in the process. Child victims’ participation is limited and problematic. Important aspects of children’s development and the right to equality are further neglected. As to protection, while this is clearly a goal of the criminal justice system (unlike the other human rights principles), the low reporting rates of crimes against children, and the evidentiary difficulties associated with such crimes, make it difficult for the criminal justice system to reach this goal in a satisfactory manner. Further, an investigation into the psycho-social needs of child victims, such as an apology, direct (positive) interaction with the perpetrator, validation and mourning, reveals that they are typically not addressed in the criminal process. These matters are discussed in this chapter, as well as some suggestions for making the criminal justice process more oriented toward the needs–rights of child victims.

Accordingly, this chapter begins by uncovering the strains related to the involvement in the criminal justice process for all victims. These difficulties result from the fact-oriented nature of the process, which requires victims to discuss their victimization in detail, leaving out any ‘irrelevant’ information such as their feelings, background or special circumstances. Additionally, the outcomes of the process are typically dichotomous — either acquittal or a finding of guilt — with incarceration often linked with the latter. These outcomes can cause significant emotional burden on victims: if the offender is acquitted, then the message is one of disbelief in the victim’s report. If the offender is found guilty (and consequently has to endure...
punishment), then the victim might suffer self blame. When there is an ongoing relationship between the victim and the offender, economic and emotional losses can also be experienced.

Next, the chapter considers the difficulties that are unique to child victims, due to their dependency on adults, lack of experience, and increased vulnerability. Indeed, empirical studies focusing on children’s involvement in criminal proceedings as witnesses suggest that such involvement may have short as well as long term effects on their emotional wellbeing and behavior.

The chapter then moves on to discuss some of the reforms introduced in many jurisdictions in order to reduce the negative effects of the process on child victims. However these reforms have only shown partial success, and their limitations are discussed as well.

Finally, this chapter evaluates the criminal justice system through the needs–rights model. Analyzed in this way, it becomes clear that even in a utopian criminal justice world where all victim–friendly reforms were to be applied to all cases of child victims, still victims’ rights would not be met in a satisfactory way.

In the concluding part of this chapter, some suggestions for improving current criminal justice processes are presented.

4.2 Victims in the criminal justice process: distressing elements

In Western, adversarial criminal justice systems the major participants are the state — represented by the prosecutorial authority, and the offender. Victims are typically only witnesses. In many cases, the process ends with a plea bargain, leaving no role for the victim. In other cases, victims are called to give testimony, and while doing so, to put themselves in the hands of defence attorneys who are trained to conduct harsh cross examinations. Seen as a ‘piece of evidence’ (albeit a central one), victims often are not given opportunities to tell their stories in their own terms, to ask questions that bother them, or to talk about the aftermath of their victimization. Indeed, ‘If one set out by design to devise a system for provoking intrusive post–traumatic symptoms, one could not do better than a court of law’ (Herman 1992, p. 72).

Kim Scheppele (1989) proposes a social critique of the criminal justice process through the concept of narratives. She criticizes the legal system as differentiating between ‘insiders’ and ‘outsiders’: narratives told by ‘insiders’ — typically white, middle class males are accepted and believed. In contrast, narratives told by outsiders (whether they are defendants, victims or witnesses) such as women, the poor

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1In inquisitorial legal systems, such as Austria, Germany, Norway, Poland, Sweden, and Yugoslavia, victims have the right to act as subsidiary, or supporting, prosecutors by submitting evidence and participating in the legal debate: see Tobolowsky 1999, p. 25. However, in Western, adversarial legal systems victims typically have a passive role in the process. The conflict, as Nils Christie (1977) famously noted, was ‘stolen’ by the system away from the hands of the direct parties.
and people of color are rejected, disbelieved or are not heard at all. Scheppele argues that having one’s story disbelieved and transformed into something completely different is one of the most disempowering experiences one can have. The rejection of stories told by the ‘outsiders’, Scheppele further explains, is not necessarily done explicitly. Rather, rules of evidence and relevancy restrict their ability to tell their stories in their own way, and exclude much of their narratives. Stories need to fit the legal ‘template’. Details that do not fit are simply excluded, do not become legal facts. For example, subjective feelings and impressions do not count as relevant in the legal template and therefore are rejected. Similarly the history of a person that might explain their behavior (for example, not resisting sexual abuse) are often excluded from the legal process, as it is only interested in the ‘facts’ at the time of the offence.

Caroline Taylor (2004) builds on Scheppele’s thesis and provides a feminist, critical analysis of the experience of young sexual abuse victims in the court process, based on in–depth examination of all court hearings of several case studies in Australia. Taylor’s arguments is that criminal proceedings generate ‘stock stories’ (2004, p. 18) that represent the domination of adult males and reject and undermine the narratives of victims — typically young women and girls. These stories are created in the following way: defence attorneys use the complainant’s initial interview (either with the police or in the preliminary hearing) as raw material. They exclude those parts that are undesirable through evidentiary rules and fill the gaps with alternative information, creating a story favorable to the accused. They are able to do so since the adversarial system has developed through its history many rules that are not about truth finding but about providing ammunition to the competing parties. Consequently, instead of telling their story in their own words, victims are required to ignore some parts of their story and even change their testimony to comply with evidentiary rules. These gaps, silences and inconsistencies in victims’ stories are held against them and make their narratives appear less compelling than those of the defence (Taylor 2004, pp. 24–30).

For example, in one of Taylor’s case studies victims were required not to use the word ‘rape’ in their testimony because the offence was legally termed ‘incest’. Victims were even threatened with contempt of court if they continued to use this word, referring to their on-going sexual abuse by their father (2004, p. 32). Another example Taylor presents through the cases she analyzed is when on-going abuse is narrowed in the preliminary hearing, due to evidentiary difficulties, to one or two occasions which can be specifically dated. The victim then is prohibited from mentioning other occasions, although in her memory these all may be linked together. These create forced gaps, silences, and sometimes inconsistencies. Juries are only aware of one or two incidents, and do not understand that the inconsistencies may result from the victim’s difficulty in identifying the specific sequence of events in a particular event.

Moreover, Taylor describes how previous testimonies and interviews provide numerous opportunities to find contradictions and gaps, which are used to prove the victim is a liar. Facts about family tensions and the victim’s past behavior (often told by the accused) are used to portray the victim as bad and suggest revenge and
greed as motive. The accused on the other hand is secured by legal rules against any mentioning of past criminal behavior. Furthermore, the accused can choose to remain silent throughout the trial and leave it to the defence attorney to provide legal representation (2004, p. 38). As a result, victims tell their story in an extremely hostile environment. The explicit goal of this storytelling is to provide the defence opportunities to find inconsistencies and portray them negatively (Taylor 2004).

Taylor’s research is based on a small number of cases in one Australian jurisdiction. It would therefore be wrong to conclude that all cases, or at least sexual abuse ones, are dealt with in the same manner everywhere. However, the evidentiary and procedural rules that allow these dynamics, as well as the ‘competition’ between the prosecution and the defence, do exist in most adversarial jurisdictions and derive from the nature of the adversarial legal process. Moreover, what Taylor demonstrates are not explicitly aggressive tactics against the victim (which might be prohibited or at least limited in some courts, especially where legal reforms have been introduced), but a more subtle degradation of the victim’s credibility through a carefully planned use of these legal rules. Such tactics may be resistant to prosecutors’ objections, since they often comply with the written word of procedural and evidence law. It is possible therefore to speculate that Taylor’s description can well apply to many courts across different jurisdictions, in various levels of accuracy.

4.3 Child victims in the criminal justice process: particular vulnerabilities

If the criminal justice process is stressful for adult victims, then it is far more stressful for child victims. First, due to their limited knowledge and lack of experience in such proceedings, children’s (and particularly young ones) understanding of the process, its importance and the rationales behind various procedural rules is very limited. Therefore they might experience greater anxieties, resent the need to testify, or believe that they are the ones on trial. Second, taken away from their natural environments of school and home, children need to communicate with a large number of unfamiliar adults, many of them are often not trained, nor used to speaking with young people. In this adult oriented environment, children might feel alienated and scared.

Closely related is the problem of language. Professional jargon, while often threatening and unclear to many adults, is particularly threatening for children whose vocabulary has not fully developed. Even words that professionals think are not ‘jargon’ might be unfamiliar and enhance the anxiety of young victims. In addition, childhood victimization carries with it some specific characteristics that make the process harder for children. Often, a large number of professionals are involved (such as child protection and education officials) who are not typically

\[This\ is\ not\ the\ case\ in\ some\ jurisdictions.\ In\ the\ UK\ for\ instance,\ a\ defendant’s\ criminal\ record\ can\ be\ admitted\ on\ a\ ‘tit–for–tat’\ basis\ where\ the\ defendant\ has\ attacked\ the\ character\ of\ a\ prosecution\ witness.\]
involved in crimes against adults. As a result, children sometimes are interviewed multiple times. Combined with their limited understanding of the process, children often think that their reports are somehow wrong or that they themselves are under investigation (Morgan and Zedner 1992, p. 116). Further, particularly in intra-familial crimes, children may incur direct financial and emotional consequences as a result of the defendant’s incarceration and the family breakdown. Finally, since children are often considered as less reliable witnesses, they are regularly faced with either the acceptance of a plea bargain, or a particularly harsh investigative process in court (Morgan and Zedner 1992, pp. 121–122).

Indeed, the criminal process has been notoriously known as being re-victimizing, or causing a ‘secondary victimization’, for many child victims (Morgan and Zedner 1992, Fortin 2003, Herman 2003, Zedner 2004).

Unfortunately, with only very few exceptions (Morgan and Zedner 1992, Finkelhor et al. 2005), all the research work in this area has focused on the experience of specific categories of child-victims — those who suffered sexual and intra-familial crimes — and has neglected to study the involvement in the process of children who have been victims of other types of crime (Whitcomb 2003). Accordingly, this section reviews the research regarding mostly victims of sexual and family violence.  

### 4.3.1 Testifying in court

Testifying in court has consistently been found as a stressful task for children (Eastwood and Patton 2002, Ghetti et al. 2002, Whitcomb 2003, Malloy et al. 2005). Increased anxiety during testimony has been linked with being under cross examination, having to face the accused, discussing personal events in public, the formality and unfamiliarity of the process, and the need to testify multiple times (Cashmore 1995, Ghetti et al. 2002, Malloy et al. 2005). Repeated testimonies and harsh cross examinations are correlated with greater distress during testimony as well as with higher risk of trauma in the longer term, including in adulthood (Ghetti et al. 2002, Whitcomb 2003, Malloy et al. 2005). In Australia, children who were interviewed following their cross examination said that the cross examination, which could take hours and days, was particularly stressful. They described it as horrible, confusing and upsetting, and many felt they were being accused of lying (Eastwood and Patton 2002, p. 123). This is typical of most adversarial systems in which the competing parties are trained to portray the witnesses for the other side as unreliable. 

Unfortunately, many judges and magistrates have limited or no knowledge on the dynamics of sexual abuse and they tend not to limit cross examination, even when there is limiting legislation (Eastwood and Patton 2002, p. 126).

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3 Although it is unclear whether child witnesses are more often victims of abuse rather than of other types of crime, there is merit in exploring their experiences in court in detail. Clearly, the contents of their testimony is typically more sensitive than that of child victims of property crimes and other, less serious, crimes.

4 In inquisitorial systems, in contrast, there is less intimidation and cross examinations are not inherently aggressive, since they are conducted by the judge (Groenhuijsen 1994, p. 169). In these systems, perhaps less protections and victim preparation are needed.
4.3.2 Waiting for the testimony

Delays in the trial and particularly in the child’s testimony can also be stressful for children and at the same time may add evidentiary difficulties as children’s memory can fade (Fortin 2003). In Australia, in-depth interviews of child victims and their parents revealed that long periods of waiting (lasting an average of 18 months) prevented children from being able to move on with their lives. They were expected to maintain their memory about what happened, were not allowed to discuss it with their families and supporters and their psychological treatment was put on hold. Typically they spent their time worrying about the upcoming trial. Children reported having nightmares, feeling depressed, feeling great fears, not being able to concentrate at school, as well as self hatred and suicidal behavior (Eastwood and Patton 2002, p. 115).

4.3.3 In the courthouse

In some jurisdictions child witnesses still have to wait (often for long hours, even days) in waiting rooms or corridors that are not geared for children. Often they are worried about meeting the offender and the offender’s supporters. Sometimes they are not allowed to leave the room, either for their protection (to prevent an unwanted encounter with the defendant) or for fear of contaminating their testimony. These waiting periods are stressful for children, especially when there are no child friendly facilities (Whitcomb 2003, Malloy et al. 2005).

4.3.4 Specific issues in family abuse cases

When allegations of sexual abuse occur within families, there are additional difficulties. First, reporting the abuse carries the potential of separation from the family, which is a great source of stress and uncertainty for abused children (Ghetti et al. 2002, Malloy et al. 2005). Second, these children might find themselves testifying and being interviewed in multiple proceedings, each of them stressful: in the criminal court (for questions of guilt and penalty), in the juvenile court (for protection measures), and in the family court (as part of divorce proceedings) (Myers 1994). Finally, the need to testify against their caretaker is particularly difficult since this is often someone whom they still love and hope to be loved by, despite the victimization (Fortin 2003, p. 461).

4.3.5 Summary

Empirical findings support arguments regarding the stress related to the involvement in the court process for child victims of abuse, especially with regard to the child’s own testimony. While most or all children who testify endure anxiety during their testimony, many others suffer emotional difficulties which continue in the following weeks and months after the trial, especially after being interviewed numerous times and being required to go through unpleasant cross examination. In extreme situations, testifying in court has been correlated with long term mental
health problems which continue into adulthood — particularly if the child victim did not have maternal support and when the trial ended with acquittal (Whitcomb 2003, Malloy et al. 2005).

It is unclear whether child victims of crimes other than sexual and family abuse endure similar difficulties from the criminal justice process, as there is hardly any empirical research investigating the effects of the court process on child victims of other crimes. Referring to child victims generally, Finkelhor and Kendall-Tackett (1997) argue that the effect of testifying in court changes with age, and more specifically, that pre–school children are actually less distressed by their testimony than older children. The authors claim, however, that although children were negatively affected in the more extreme forms of court involvement (such as being interviewed multiple times), criminal prosecution in itself did not put children in a worse position overall (1997, p. 21). It is reasonable to assume, however, that giving testimony in open court may be challenging for any child. Many similarities exist, such as the formal, unfamiliar environment of the court, the cross examination which is aimed at reducing the witness’s reliability, and the unpleasant anticipation before giving testimony. At the same time, it will be equally reasonable to assume that the less sensitive the matter, the easier will it be for the victim to discuss it, even in open court.

Whether it is the assumption that other types of crimes are easier to discuss, or whether it is lack of public interest — it is notable that most legal reforms aimed at reducing the stress for child victims have focused solely on victims of family and sexual abuse. Child victims of other crimes such as theft and physical assaults by strangers are usually not provided with special measures of protection, and often are required to testify in the same manner as adults. Even in jurisdictions such as the UK where all child victims are treated, by law, as vulnerable and deserving special protections, in reality, child victims of crimes other than sexual and family abuse, and especially older children, are not treated as vulnerable (Burton et al. 2006).

The next section discusses some modern reforms and their application, especially in cases of sexual and intra–familial abuse.

4.4 Recent reforms and their limitations

Increased awareness regarding the plight of crime victims led many jurisdictions to legislate victims’ reforms. Most reforms include the rights of victims to be treated with respect and be protected from further harm, to receive information about the progress of the case dealing with their victimization, and to receive restitution from the offender or alternatively, state compensation (Groenhuijsen 2004). However, the implementation of these reforms has been limited (Groenhuijsen 2004). In addition, there is no empirical evidence that the emotional healing of victims has improved in jurisdictions where reforms have been introduced (Herman 2003). Another kind of criticism refers to victim compensation. According to Zehr (1990), compensation is often limited to violent crimes; it is typically regarded as welfare or charity based, and not as a symbol of the state legal responsibility for the criminal loss suffered
by the victim; many victims, such as those with criminal records are excluded; and
often compensation does not take into account the specific needs of victims.

In addition, many jurisdictions, including the US, Australia and Canada, have
enacted Victim Impact Statements (VIS), or Victim Personal Statements (in the
UK), to include victims’ views in the sentencing process (Strang and Sherman 2003).
However, with regard to the use of VIS in particular, it is now questionable whether
this is effective in enhancing victims’ involvement and satisfaction with the criminal
justice process (Erez et al. 1994, Strang and Sherman 2003). Moreover, opponents of
VIS argue that the punitive nature of the system may expose victims to harsh adver-
sarial investigations regarding their statements (Goldsmith et al. 2003, p. 356), and,
when the process outcomes are severe, make them feel guilty and fear retaliation
from the offender (Zehr 1990). It is also argued that VISs are often rejected or disre-
garded (Erez et al. 1994, Taylor 2004). Furthermore, victims’ statements regarding
the impact of the crime may relate to only those crimes that have been allowed in
the courtroom — and not those that have been excluded through evidentiary rulings
(Taylor 2004).

In addition to these reforms, some child–specific reforms have also been enacted
to meet the needs of child–victims of special crimes. Examples for these reforms are
the following (Morgan and Zedner 1992, Eastwood and Patton 2002, Fortin 2003,

• Expedited proceedings

• Special waiting areas

• Reduced formality, i.e. taking off wigs and robes and changed seating arrange-
ments

• Exemptions from corroborating evidence requirements in cases of child testi-
mony

• The use of video cameras for early interviews

• The use of Closed Circuit Television (CCTV) to enable children to testify from
another room during the trial

• The use of screens to prevent eye contact when CCTV is not available or
undesirable

• Prohibitions on defendants from conducting cross examinations

• The use of support persons to sit next to children testifying in court

• Special children’s courts for sexual abuse cases

Most of these reforms have arguably eased the stress on child victims, in par-
ticular the use of CCTV for children who have to testify in court (Myers 1994,
For example, in–depth interviews with 130 participants across three Australian jurisdictions (Eastwood and Patton 2002) revealed that where extensive reforms have taken place many more children stated that they would report again should they be victimized. In particular, knowing in advance that they would not have to confront the accused, either in the waiting area or during their testimony, was a great relief for victimized children, as were the shortened waiting periods and the child–friendly waiting rooms. Although testifying from a different room via CCTV was still stressful, children nevertheless thought it was somewhat better:

Having someone yell at you through a television screen is not as upsetting as someone yelling at you from five feet away (Eastwood and Patton 2002, p. 123).

However, it would be wrong to conclude that with the introduction of these innovative procedures, the legal process is benign for child victims. Often the implementation of these reforms is limited and their effectiveness questionable.

First, despite their availability, some of these reforms are only rarely used, either because of questions regarding the defendant’s due process rights (especially in the US, where the right to due process has a constitutional status), or because of the prosecution’s concerns that the use of an alternative to the child’s live testimony in court will reduce the credibility of the child’s testimony, and as a result impair the prospects of proving the case (Goodman et al. 1998, Eastwood and Patton 2002, Ghetti et al. 2002, Whitcomb 2003, Malloy et al. 2005). In particular, the US Supreme Court stated that the use of CCTV has to be balanced with the defendant’s constitutional right to confront the accuser. Accordingly, CCTV can only be used in the US if there is proof that the child will be so affected by confronting the accused in court that they will not be able to reasonably communicate while testifying (Ghetti et al. 2002, Malloy et al. 2005). This narrow ruling makes it difficult to use CCTV in most cases. Indeed, only a small minority of victimized children in the US are allowed to give their testimony through CCTV (Myers 1994, Whitcomb 2003). In the UK, where comprehensive reform has granted all child victims a ‘status’ of vulnerable witnesses deserving special measures of protection, CCTV is also used only in a minority of cases, either because of due process considerations or because of assumptions regarding the capabilities of older children to testify in court (Burton et al. 2006, pp. 52).

Videotaped forensic interviews are yet another example: in the United States, they are only used in 17% of child sexual abuse trials (Malloy et al. 2005). In the UK, they are employed only in about a quarter of cases involving child witnesses — despite the statutory presumption for the use of video recorded interviews (Burton et al. 2006, p. 46). Furthermore, even when such interviews are videotaped, they are usually additional to the child’s live testimony — and not an alternative to it, which defeats the purpose of reducing the number of interviews the child has to go through (Malloy et al. 2005). Indeed, there is no evidence that the use of tape-recorded interviews reduces the number of interviews child victims have to endure (Cashmore 2002).
Other measures are used even less. The removal of wigs, for instance, is used only in 15 percent of identified vulnerable witnesses in the UK (Burton et al. 2006, p. 582). In New South Wales, where a specialized Children’s Court was piloted for sexually abused children, a recent evaluation (Cashmore and Trimboli 2005) found that despite specific training and child-friendly regulations, not much has changed for child victims of sexual crimes. In particular, cross examination was still experienced as a stressful, unfair process and judges varied in their motivation and effectiveness in controlling defence attorneys. Additionally, delays often still occurred and technical problems with the equipment emerged. Even support persons, although welcomed in theory, did not always escort the child witness to court, for various reasons, such as being required to testify at a later stage (Cashmore 1995). Trained volunteers or staff who accompanied the child as supporters did not resolve this difficulty. From a child’s perspective, a victim services volunteer, who the child has met only shortly before the trial, does not address their need to be escorted by someone they are familiar with and trust (Plotnikoff and Woolfson 2004).

Furthermore, the use of VIS, while questionable with regard to adult victims, is particularly problematic with young ones. In a study of child witnesses conducted by Cashmore (1995), all court hearings in New South Wales, Australia regarding child sexual assaults during a 12 months period in 1991–1992 were surveyed, totaling 517 cases. VIS were completed in only 23.4% of convictions, but only 13.8% were considered by the court. Younger children (aged 5 – 11) were more likely to complete a VIS in comparison with older children, and the researcher speculated that this was due to higher refusal rate by children aged 12 and older.

Another limitation of these reforms is that even when practised, they do not offer a full remedy. For example, even tape-recorded interviews may be experienced as stressful by children (Fortin 2003). Moreover, often technical difficulties emerge when certain techniques are being used. For example, when screens were used in Australia as an alternative to CCTV in order to prevent eye contact between the testifying victim and the defendant, problems arose because children could still hear the accused and see body parts (Cashmore 1995, Eastwood and Patton 2002). Even CCTV, which seems to be clearly a positive aid for young victims who need to testify, is not always used to children's satisfaction. There is evidence that some child victims would prefer to be present in the courtroom to tell their story in the defendant's presence and see him or her being punished. At a minimum, children would prefer to be consulted regarding the use of CCTV beforehand (Wade 2002). This is not the current practice, at least in the UK, despite existing legislation (Plotnikoff and Woolfson 2004, Burton et al. 2006). Additionally, children who testify through a CCTV are not allowed to have a family member as a supporter, and if informed, children might have preferred to give testimony in court, perhaps behind a screen, where they could have a familiar support person sitting next to them (Plotnikoff and Woolfson 2004). Finally, it is important to remember that typically these innovations are aimed at child victims of sexual and severe violent and family crimes. Other child victims are required to participate at the trial as any other witness, without any support (Whitcomb 2003). Even when reforms are comprehensive and include all child victims, such as is the case in the UK, in reality,
children who are not sexually assaulted, as well as older children, are often not provided with special protection measures (Burton et al. 2006).

A recent innovation which has gained wide support in the United States is the construction of Children Advocacy Centers (CACs). These child–friendly centers provide multidisciplinary services to child victims. Highly trained interviewers conduct videotaped forensic interviews with the involvement of police, prosecution and child protection officials, to minimize the number of needed interviews. However, it is still unknown to what extent CACs substantially help reduce the number of interviews and decrease children’s stress (Whitcomb 2003, Malloy et al. 2005).

Another widely accepted reform is the preparation of children for court through age–appropriate explanations of the court process, visits to the courtroom and the distribution of child–friendly brochures describing the court experience. Enhancing children’s understanding of the process has been found effective in decreasing their anxiety and improving their testimony. At the same time, these preparations are considered less controversial in terms of defendants’ rights and the prosecution’s interests, as long as they do not involve rehearsing or coaching the child (Morgan and Zedner 1992, Ghetti et al. 2002, Whitcomb 2003, Malloy et al. 2005). However, even this seemingly simple innovation is not implemented uniformly across jurisdictions, and some preparation programs are unsatisfactory. For example, children testifying in one Crown Court in England said that the preparation program did not provide them with sufficient information about their role in the trial, and some complained that it in fact heightened their anxiety (Wade 2002). Burton et al. (2006, p. 42) found that British children could not make informed decisions as to their preferred method of testifying since they had not had a court preparation visit at the stage of making those decisions, and therefore did not have a real understanding of how the various measures work.

It seems then that while there are some data reporting enhanced satisfaction of child victims when some of these aforementioned reforms are used, still the experience of most child victims in the criminal justice process is negative (Plotnikoff and Woolfson 2004, Cashmore and Trimboli 2005, Burton et al. 2006). First, important reforms such as CCTV, videotaped interviews and expedited proceedings are typically implemented in cases of family and sexual abuse of children. Many other young victims, while still vulnerable due to their young age, are often required to testify in court as adults. Second, even in cases of sexual and family abuse very often prosecutorial considerations and legal constraints lead to the decision not to apply stress reducing techniques, exposing victims to live testimony in court in front of the defendant. Thirdly, the effectiveness of these reforms has not yet been proved, and seems to vary among jurisdictions.

4.5 Potential benefits of the criminal justice process for child victims

Despite evidence regarding the stress associated with children’s involvement in the criminal process following their victimization, it is important to remember that not
everything is negative in that process, and not all children experience it as stressful or traumatic.

Perhaps the most obvious positive outcome arising from the criminal process from the victim’s point of view is when the defendant is found guilty. A finding of guilt delivers a message of trust in the child’s testimony, an acknowledgment of the wrong done to him or her, and a public message of denunciation. Indeed, there is evidence concerning the higher prevalence of mental health problems in adulthood for child victims whose cases ended without a finding of guilt (Whitcomb 2003, Malloy et al. 2005).

In a study of Australian child victims involved in criminal proceedings (Cashmore 1995), about a half of the children thought there were some positive things about going to court. The highest correlate of positive replies was a finding of guilt, and the main positive things in going to court, according to the half who replied positively, were feelings of vindication and that justice was done.

Another positive element in the criminal justice process may be a feeling of empowerment as a result of being able to testify against the perpetrator. It is important to remember that there are individual differences among children. In contrast with the negative experiences many children report as presented earlier, some children find the opportunity to stand in court (or in a separate room) and tell their story an empowering experience (Peters et al. 1989, Cashmore 1995, Ghetti et al. 2002).

Thirdly, some children find the court experience cathartic — an opportunity to confront their past ‘once and for all’ and put it behind them afterwards (Peters et al. 1989, Cashmore 1995).

How common are these positive experiences for children? It is unfortunate that there have only been a few studies comparing the long term emotional and behavioral problems of testifying and non–testifying child victims (Edelstein et al. 2002, Herman 2003). There are, however, data that suggest that maternal support and a finding of guilt are the most important determinants of children’s short and long term reactions to the legal system (Edelstein et al. 2002). Victim inclusion, choice and empowerment may also enhance victim satisfaction as well as improve their mental health compared with victims who are dealt with disrespectfully and are excluded from the process (Herman 2003). Runyan et al.’s (1988) study of 100 allegedly abused children indicated that the involvement in juvenile court as witnesses in care and protection proceedings had a positive effect on them. These children showed reduction in anxiety faster than those involved in other proceedings or those whose case was not brought to court. It is important to note, however, that the results relate to juvenile court proceedings, where a safety plan for the child victims was negotiated, rather than involvement in the criminal process.

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5This of course does not mean that all acquittals are erroneous.
6While another half reported that there was nothing positive about it.
7This was mainly true for children under 12.
8Interesting results, however, from a comparison between the mental health condition of adult victims whose cases were referred to court and those whose cases were dealt in restorative conferences were found by Angel (2006), as discussed in Chapter 3.
Finally, although this thesis reflects a child–centered perspective, one cannot ignore the societal benefits typically associated with the criminal justice system. These benefits are, in a nutshell:

- Holding the offender wholly responsible for the crime and absolving the victim of blame
- Validating the norm that no one has a right to abuse children
- General deterrence of others against committing similar crimes, through public punishment
- An opportunity for the court to refer offenders to treatment, for prevention of future recidivism
- An opportunity to maintain followup on offenders through their criminal record (Peters et al. 1989).

These societal benefits, however, while apparently important, represent aspirations rather than empirically demonstrated realities. As the next section will demonstrate, there are serious obstacles to achieving these goals. First, reporting rates of child victimization are very low. Second, the majority of reported cases are resolved through guilty pleas in which less serious offences are recorded. Finally, there is shortage in effective treatment programs for offenders.

Even when these social benefits were achieved, a human rights approach toward children raises the unavoidable question whether the price children pay personally in pursuit of these social goals is justified.

To summarize, some children may gain emotional benefits from being involved in the criminal process following their victimization. However, the large body of literature describing the hardships this process puts on many children presents quite a negative picture. While some reforms have been introduced to reduce the stress associated with testifying in court, they are limited in their application and often raise legal and practical problems. Furthermore, there are other matters, arising from a child’s rights perspective, which are typically neglected when assessing the involvement of child victims in court process and the success of various reforms. Accordingly, the next section will consider the criminal justice process and its shortcomings through a broader needs–rights perspective.

4.6 A needs–rights evaluation

As mentioned earlier, when certain techniques are practised, much of the stress experienced by child victims during the court process can be eliminated or at least reduced, and the satisfaction of child victims with the process may be increased (Eastwood and Patton 2002). Accordingly, it is possible to imagine a perfect system where the reforms discussed earlier are all fully implemented, and consequently children are protected against any stress associated with having to confront the offender, speaking about personal matters in public, having to go through aggressive
cross examinations, and having to endure long delays. However, not only are these reforms limited in application because of financial, bureaucratic, legal and professional training obstacles (Cashmore and Trimboli 2005, Burton et al. 2006); even in their broadest implementation, they are aimed at addressing only some of the human rights and psycho-social needs of child victims.

Chapters 2 and 3 presented an integrated account of the human rights and evidence-based needs of child victims. This model expands the discussion beyond the common themes of court-related anxieties and special protective measures for child victims. While not impeccable in its structure, it illuminates other elements important for child victims as respected individuals, such as participation, equality and rehabilitation. Accordingly, the following discussion will evaluate the criminal justice process through the needs–rights model. As the model suggests (See page 78), the human rights principles used as measurements for such evaluation are the child’s best interests, equality, development and participation, as well as the two specific rights associated with victimization, protection against further harm and rehabilitation. These principles are intertwined with each other, and their practical meanings in the context of childhood victimization can best be understood through the evidence-based findings regarding children’s needs. These psycho-social needs are grouped into four boxes, each of them corresponds to some of the human rights principles.

Since it is difficult (and in fact futile) to isolate each one of the model’s indivisible components, the following discussion divides the model into four quarters (‘clusters’), each of them representing one box of psycho-social needs combined with their corresponding human rights principles. The four clusters are Best Interests, Control, Procedural Justice and Protection.

### 4.6.1 The Best Interests cluster

As Figure 4.1 demonstrates, this cluster relates to three interrelated human rights principles: best interests, rehabilitation and development. This interrelationship can be explained in the following way: while the best interests principle creates an obligation to assess the individual child’s wellbeing and give it primacy, the rehabilitation principle emphasizes the long term interests of child victims and the duty to address them. In assessing the short- and long-term interests of child victims, it is crucial to consider their developmental stage and conditions for their future healthy development.

As described in page 77, the Best Interests cluster includes findings drawn from the psycho-social literature regarding the importance of having strong support networks, experiencing acknowledgment of harm and validation of behaviors and feelings, having opportunities to mourn and receiving appropriate reparation.

An examination of adversarial criminal justice processes reveals that most of these needs–rights are either neglected or in conflict with the goals and modus operandi of these processes. The criminal justice system by its nature does not give centrality to the interests of victims, young or adult. The goal of the Western criminal justice system is not to heal, promote wellbeing or rehabilitate victims.
Figure 4.1: The Best Interests cluster: shortcomings of the criminal justice process
Rather, it focuses on defendants — deciding whether they are legally responsible for a specific crime and on the appropriate punishment, when guilt is proved. While there are social goals that may promote the wellbeing of victims (or children in particular), these goals match the interests of the specific child victims only rarely.

For example, it is possible to argue that by punishing the offender, society demonstrates solidarity with the victim and affirms the severity of the crime committed against them, thus providing the social acknowledgment and public support victims want (Hudson 1998, p. 249). However, demonstrating concern over the severity of the offender’s behavior is different from showing concern over the severity of the harm done to the victim. The criminal justice system does not demonstrate the latter by punishing the offender (Zehr 1990). Moreover, it is argued that even a trial which ends with the imprisonment of the offender may in fact be in conflict with the victim’s interests, as it may make the offender unable to compensate them. In particular in the case of crimes against children, incarceration does not necessarily promote the child’s best interests. In family abuse cases, for instance, most children only want the abuse to stop rather than see the abuser (typically a parent) incarcerated (Fortin 2003, p. 521). Imprisonment may in fact be in direct contradiction with the child’s best interests, development and rehabilitation, as it severely affects the child economically and emotionally. Furthermore, the criminal sanctions for child abusers rarely ensure that they do not re-offend. Indeed, in the case of paedophiles, a prison sentence may reinforce their addiction (Fortin 2003, p. 537).

Testifying in court, and particularly being under cross examination, is often in direct conflict with the child’s best interests and rehabilitation needs. As this chapter has shown, there is voluminous evidence of the stress related to the child’s own testimony, as well as medium- and long-term consequences of testifying in court.

One of the explanations for the risk associated with child victims’ testimony is that in direct contrast to their need for a supportive, sympathetic audience, in the criminal justice process victims tell their story in the least supportive manner possible (Taylor 2004). For the child, the adversarial notion of lengthy cross examination in a hostile and intimidating courtroom environment in the presence of their abuser, appears to be designed to reinforce feelings of powerlessness and blame (Eastwood and Patton 2002).

It is also likely that the timing of the court process does not meet the child’s timing of recovery (Herman 1992). For example, children often do not receive psychological treatment for fear that the therapy will contaminate their testimony (Fortin 2003, p. 525). The criminal justice process may also interfere in the important process of establishing safety, because of a threat of retaliation by the offender (Herman 1992, 2003).

Moving beyond the negative aspects of testifying in court, the criminal justice process does not include many rehabilitative and reintegrative elements for crime victims, nor is rehabilitation of victims a goal of the process. Often, in fact, it may enhance feelings of disempowerment, distrust, humiliation, anger and fear, as demonstrated earlier. These are obstacles in the psychological and social healing process of the child victim. Although in family abuse cases, and to some extent in
extra-familial sexual abuse cases, there are mechanisms outside the criminal justice system that are aimed at providing social and psychological services for victimized children, this is typically not the case for child victims of many other types of crime. Children who have been violently assaulted, robbed or bullied may fall between the cracks and not receive any psychological treatment or other professional support.

While reparation might contribute to victims’ healing process, court ordered compensation often does not address the specific needs, or wishes, of the individual child. Even when compensation is available for victims, this is typically established not according to the specific victim’s needs and wishes but depends on either set rules (as is the case in the UK) or the decision of the judge or jury based on their impression of the severity of the crime (as is the case in the US).

It seems, then, that not only are the child’s short, long and developmental interests peripheral in the criminal process; often the process and its outcomes are in direct opposition to these interests. From a child’s needs–rights perspective, only very rarely are there opportunities throughout the criminal process to experience support, social acknowledgment and validation, to mourn over their loss and receive individually–matched material reparation.

4.6.2 The Control cluster

As discussed in Chapter 2, the Convention stipulates that any child who is able to form his or her own opinion, should be able to express this opinion freely. Furthermore, decision–makers are expected to give such opinion due weight, in accordance with the child’s age and maturity. This means that children are to be seen as partners in decision making processes regarding their lives, they should be well informed, and their opinion should have a gradually greater impact on the outcome of such processes as they age and develop their capacities. Participation is associated with greater self esteem, trust in others and self respect (see Chapter 2), and therefore is intertwined, especially in the context of childhood victimization, with the rehabilitation and best interests human rights principles. Participation is related to feelings of empowerment and control, it provides opportunities for having a direct interaction with the perpetrator and opens the door for an exchange of apology and forgiveness (see page 79). When all these occur in a safe, respectful manner they might contribute to the short and long term interests of child victims, thus addressing the rehabilitation and best interests principles as well. The relationship between participation, rehabilitation, best interests, and the needs of child victims emerging in this context is demonstrated in Figure 4.2.

Does the criminal justice process adhere to these needs–rights? The following discussion suggests that even when children are provided with opportunities to express their views regarding the preferred punishment through VISs, their overall experience of the process is one of disempowerment, lack of control and often alienation. Furthermore, the criminal process does not foster direct interactions between victims and offenders, it discourages apologetic expressions, and does not provide space for any open, constructive discussion about the crime and its effects.

Although the introduction of Victim Impact Statements in many jurisdictions
Figure 4.2: The Control cluster: shortcomings of the criminal justice process
reflects an acknowledgment of the victims’ plight to be heard, it is now questionable
whether they are indeed effective in enhancing victims’ involvement and satisfaction
with the criminal justice process (Strang and Sherman 2003). First, even when
VIS’s are used regularly, victims can only make representations and requests to
judges and prosecutors who are the decision–makers (Roach 1999), and who often
reject or disregard them (Taylor 2004). Children give VIS information, and have this
information considered by judges, in a particularly low number of cases (Cashmore
1995).

Furthermore, victims’ input is strictly limited: they may relate to only those
crimes that have passed evidentiary obstacles (Taylor 2004). They can only relate
to the past (what happened to them and how the crime affected them), and cannot
have a future oriented deliberation regarding the way the trial should be handled,
the guilt of the offender and the preferred sentence. Finally, the timing of presenting
the VIS to decision–makers, and the identity of those who review it, are not con-
tingent upon the victim’s preference. While there are good explanations for these
limitations, the fact is that victims are not partners in the major decisions that are
made throughout the process. This limited style of participation defeats the purpose
of victims’ participation, as it does not provide them with a sense of control and
empowerment which is so important for their healing.

In the context of child victims, there are further questions regarding the use of
VIS in practice, the suitability of this instrument for children of different ages and
whether staffs are trained in assisting children filling out their statements. Under
Roger Hart’s (1992) ‘Ladder of Participation’ (see page 41), in many cases chil-
dren’s submission of VIS information might meet the definition of Hart’s third (and
criticized) level of the ladder — tokenism. In tokenistic participation, children are
ostensibly consulted and have a say in the process, but are not prepared for it in
any meaningful way, and are required to communicate in adult terms (1992, p. 9).

Even when victims, and child victims in particular, are given some opportunity
to express their views through the VIS, their experience of the process as a whole
is one of lack of control. There are several reasons for this. First, the victims’ role
in the process is as witnesses, evidence holders, not equal partners. Their opinions
and wishes are secondary at best when deciding the outcomes of the trial and other
decisions along the way. Second, the criminal justice process does not provide means
for victims to ask questions or receive answers regarding the reasons for the crime
and for their own victimization. In the criminal justice process the victims (and to
a great extent the offenders as well) are passive actors (Zehr 1990, p. 55).

Third, children are being overlooked in particular, not only because adults are
used to disregarding their opinions, but also out of motivation to protect them.
As described earlier, in many jurisdictions special provisions have been enacted to
minimize the exposure of child victims to the criminal justice system. In many in-
stances children under a certain age are exempted from giving testimony altogether.
Although these protection measures are intended to protect children, they also leave
those children completely out of the communication loop, unheard and disenfran-
chised. For example, British children are usually not consulted about their method
of testifying, and even when they are, they do not receive full information about the
4.6 A needs–rights evaluation

way various measures of testifying work in practice. Many measures are not offered at all. Informed decisions about these measures, therefore, cannot be made (Burton et al. 2006, pp. 42–46).

The passiveness of victims and offenders, as well as the adversarial nature of the process have other consequences. Apologies are rare, and in fact defence attorneys typically advise their clients not to apologize since this may be regarded as an admission of guilt (Roge and Gutheil 2002). Instead of providing space for direct, honest and respectful dialogue between defendants and complainants, the criminal justice process encourages offenders to remain silent and deny responsibility, and minimizing any direct contact between the parties. This is particularly the case for child victims, where protective measures are taken to limit the child’s exposure to the process. Although the encounter with the perpetrator in the formal and alienating setting of the court room may indeed be traumatic for children, the prevention of any dialogue whatsoever with the perpetrator eliminates any opportunity for closure.

Analyzed with the elements of the Control cluster in mind, it becomes clear that even in a utopian criminal justice world where all victim–friendly reforms including VIS were to be applied to all cases of child victims, still victims would only have a limited, indirect influence on the process. In addition, there is no direct, positive interaction with perpetrators where an apology can be expressed, and there is no group discussion where children’s stories and feelings are validated in the presence of their perpetrator. As a result, the human rights principles of participation, rehabilitation, and best interests, are cast aside. Even worse, the disempowerment experienced by children in the courtroom might mirror the victimization experience itself (Eastwood and Patton 2002, pp. 127–8).

4.6.3 The Procedural Justice cluster

As Figure 4.3 demonstrates, this third cluster refers to the three human rights principles of participation, rehabilitation and equality, all tied together through the concept of procedural justice. Indeed, participation (or process control) is central in people’s perceptions of procedural justice (Tyler 1988), although with children the data regarding their views are mixed and need further examination (Melton and Limber 1992, Hicks and Lawrence 1993, Lawrence 2003). Procedural justice is also related to equality since neutrality and consistency are also part of people’s perceptions of fairness, perhaps especially for children (Lawrence 2003). Procedural justice also corresponds with rehabilitation since victims might feel closure and are able to move on from their victimization once they have ‘experienced justice’ (Zehr 1990, Strang 2002). Do victims in general, and child victims in particular, ‘experience justice’ in the criminal justice process?

Victims who have been involved in the legal process frequently feel that they were not treated fairly, that they did not have an opportunity to express their views, and that as a result the outcome is unfair (Strang 2002, p. 13). This might be especially the case in the ‘production line for guilty pleas’ (Braithwaite and Strang 2001, p. 164). When victims are not encouraged to be part of the process, when they are not treated with respect and fairness, and when they do not feel that a fair
Figure 4.3: The Procedural Justice cluster: shortcomings of the criminal justice process
and just process applied in their case (Strang 2002), they might find it difficult to heal. Indeed, in the context of childhood victimization, not only can victimization itself affect the development of children in different ways; the encounter with the legal process may also interfere with the natural course of children’s development. Negative experiences in the legal process may disrupt the psychological rehabilitation of the child. Conversely, a positive experience of the justice process may leave children with an optimistic lesson about the world and enhance their emotional growth (Murray 1999).

Beyond the limited opportunities of victims to participate discussed earlier, child victims might also encounter unequal treatment, and special difficulties in accessing justice if they belong to marginalized populations. Indeed, equality between victims is apparently not a goal of Western criminal justice systems. Victims typically cannot expect equal results in terms of process outcomes, their level of influence on the process, and the protection measures they are granted. Western criminal justice systems focus on offenders, not on victims, and the common conception of equality in justice aims at criminals and their punishment, rather than victims and their varying circumstances. Consequently, legal systems in general do not even attempt to secure equality between child victims. To mention just a few examples, young victims who have been harmed in similar ways are not necessarily granted the same kind of services and protection measures nor the same amount of compensation. Their offenders typically face different punishments, and they can expect varied encounters with criminal justice professionals. These dissimilarities are not necessarily based on disparities between victims or their victimization. Rather, they are more likely the result of differences in offenders’ characteristics, the evidence in the case, and other prosecutorial and judicial considerations.

Perhaps more disturbing, however, is the criminal justice system’s blindness to differences between children. As discussed in chapter 2, the Convention refers to ‘substantial equality’, in the sense that disenfranchised children should, as a matter of right, be provided more than ‘normal’ children, to remedy their disadvantage (Van Bueren 1999a). In reality, however, justice systems are often insensitive to the special circumstances faced by some child victims. The result of this lack of sensitivity and flexibility is that the criminal justice process is not equally accessible to all children. Examples of this inequality include, to name a few, problems in disclosing and reporting child victimization in secluded communities, where particular difficulties exist; lack of sufficient flexibility in the testimony and investigation of children with special needs; and lack of adequate services in rural areas and for non–English speaking child witnesses. This means that children who are marginalized for various reasons (and as a result are often more vulnerable in the first place), are frequently even less protected, and their interests are even more severely neglected, in comparison with urban, English speaking, ‘normal’ children.

4.6.4 The Protection cluster

The final needs–rights cluster, demonstrated in Figure 4.4, includes the development, protection and equality human rights principles, which affect each other and
are affected by empirical findings (and the need of further knowledge) regarding the effects of victimization on different children, different coping strategies among children of various ages and groups, and special vulnerabilities of specific populations of children. Indeed, to meet the right of children to be protected from violence within and outside their homes, states need to know more about children at special risk of certain types of victimization and ways of empowering those children who are particularly disempowered.

More generally, to meet the human rights framework nations need to examine whether their responses to crimes against children are effective enough in protecting children, or whether it is possible to do more. As the following paragraphs demonstrate, data on crime reports, prosecution and recidivism rates show quite a pessimistic account of the efficacy of existing criminal justice systems in combating crimes against children. It is reasonable to speculate that children belonging to marginalized populations and children with special needs are the least protected since they present various challenges in identification, reporting, and prosecuting crimes against them. Indeed, some disabled children have such limited communication abilities, that the criminal justice system is unable to protect them (Temkin 1994). Clearly, to allow these vulnerable children effective access to justice in order to meet their right to protection and equality, special mechanisms are needed to make it possible for them to overcome their communicative and emotional barriers.

**Reporting**

Given the difficulties relating to the involvement in the criminal process discussed earlier, it is no wonder that only a minority of victims choose to report the crime against them, and another minority choose to follow through the criminal process and give testimony (Zedner 2004, p. 156). Victims of sexual assaults are the least likely to report (Russell 1984, cited in Herman 2003, p. 161). Non-reporting stems from disbelief in the system’s ability to solve the crime, or from fear of re-victimization by it (Roach 1999, p. 695). In child abuse cases the reporting rates are even lower than adult rape cases — on one estimate 6% for extra-familial cases and only 2% when the abuse happened in the family (Herman 2003, p. 161). Indeed, in an Australian study of the experiences of child victims in court, many children who had been through the court process stated that they would not report again should a crime be committed against them, even when their cases had been finalized with a conviction (Eastwood and Patton 2002). This implies that the vast majority of sexual abuse cases against children are not known at all to the authorities.

**Prosecuting**

Only a small fraction of the cases which are reported to the authorities proceed to trial (Myers 1994). Many reports are screened at the investigation stage, and are hardly or not investigated at all. When the police investigation does get through to prosecution, it has broad discretion in deciding whether to prosecute or not (Zedner 2004, p. 147). A central consideration is the case’s prospects of being successfully proved in court. Young children (for fears of suggestibility) and older teenagers (for
Figure 4.4: The Protection cluster: shortcomings of the criminal justice process
concerns regarding motivation and ability to fabricate accusations) are regarded as posing special difficulties of proof and therefore crimes against them are less likely to be prosecuted than those relating to children aged 7-12 years (Myers 1994, Cashmore 1995).

Proving

While only a very small fraction of all offences result in a conviction — 2.2 percent in Britain (Zedner 2004, p. 156) — child abuse cases present unique evidentiary difficulties which may push down prosecution and conviction rates even further. Typically, the child’s testimony is the only direct evidence against the defendant, as these kinds of offences are usually committed only when no one else is present. In addition, often there is no physical evidence; even if there is, children’s tendency to delay the reporting of their abuse makes it more difficult to identify physical evidence. Moreover, physical evidence of abuse may not link the abuse with a specific perpetrator. These evidentiary difficulties make the child’s testimony central (Malloy et al. 2005). Because the child’s testimony is so central, the use of CCTV or pre-recorded interviews is problematic from a prosecutorial perspective, as prosecutors often fear that it may reduce the credibility of the child’s testimony and create a requirement to present corroborating evidence — and as a result jeopardize the success of the case (Whitcomb 2003). At the same time, putting the child on the witness stand not only exposes him or her to the stressors discussed earlier, it also reduces their ability to provide coherent, reliable testimony. This happens either because they are unable to retrieve memories well under pressure or because of lower motivation to talk (Saywitz and Nathanson 1993, Goodman et al. 1998). This choice between two evils is particularly common with young children, who are more vulnerable and at the same time less credible witnesses. The result is that younger children who most need protection are the least likely to be protected, as their cases are the most difficult to prove (Myers 1994). Children with disabilities pose similar (and sometimes greater) difficulties, and as a result are insufficiently protected by the system (Temkin 1994).

With these evidentiary difficulties in mind, it is not surprising that according to one American estimation, approximately two thirds of the cases that proceed to court end up in a plea bargain, where the defendant pleads guilty to a lesser offence or the prosecution agrees to limit the recommended punishment. When the offender is a juvenile, the case is typically dealt with in the Juvenile Court, where plea bargains are even more common, at least in the US (Myers 1994). Only a small minority of cases end up with a conviction (Myers 1994). In a study of South Australian court cases against youthful sexual offenders conducted in 1995 – 2001, Daly et al. (2003) found that only 51% of the cases referred to court were finalized (by either admission or proof). Furthermore, the more serious the offence, the less likely it was to be proved in court. Many of the charges were reduced as part of plea bargains or due to evidentiary difficulties. The authors concluded that ‘From the legal point of view, nothing happened’ (Daly et al. 2003, p. 20).
Low effectiveness of incarceration

It has been argued that crime control has led to a growth in the jail population but has failed to reduce crime (Roach 1999, Zedner 2004, p. 238). More specifically, the incarceration of sexual and domestic violence offenders is considered particularly problematic (Fortin 2003, p. 521) as it further promotes the offenders’ distorted perceptions of violence and sexuality (Hudson 1998).

The result of these difficulties in reporting, prosecuting, convicting and effectively punishing, is that criminal justice systems are far from being successful in eliminating the risk of crime for children, especially of child sexual abuse (Roach 1999, Fortin 2003). In other words, if governments are committed to the right of children to be protected against violence and abuse, then they must search for ways to increase substantially the reporting rates of crimes against children and to deal with these crimes more effectively. It is questionable whether the criminal justice system alone is able to do that. Furthermore, with these limitations in mind, it is arguable that putting children on the witness stand is simply not worth the cost (Fortin 2003).

Another concern emerging from the Protection cluster is whether responses to crimes against children are sufficiently flexible and can be adjusted according to the specific needs and capabilities typical for each developmental stage and specific needs of individual child victims. For example, one clear difference between children and adults and between children of different ages is the conception of time. While a month for an adult is a comprehensible time limit, for young children a month may feel like a life time. Accordingly, cases involving young children should be scheduled without delay (if this is what is needed for the child’s wellbeing).

Developmental data should also be considered in constructing policies regarding the identification of children at risk and prioritizing prevention strategies. For example, Finkelhor’s research group found that teenagers are more at risk of sexual offences and serious physical assaults, while elementary school children experience higher levels of bullying (Finkelhor et al. 2005). Young children, in contrast, suffer mostly from sibling assaults and property crimes. Finkelhor’s data on developmental victimology and the changing patterns of victimization risks and coping strategies throughout childhood (1994, 1997, 2005) might shed light on where current practices are failing most. There is similarly a need to learn further about how children of different ages, capabilities and specific needs are affected by the criminal justice process and the effectiveness of various techniques in meeting their needs–rights.

4.7 Conclusions

Reviewing the adversarial criminal justice system through a human rights lens in the case of child victims is very telling. It broadens the scope of exploration beyond current research regarding possible emotional difficulties arising from testifying in court and meeting the defendant during the trial. It reveals other weaknesses of the system that are equally disturbing, especially if these legal systems are committed to following the international obligations under the Convention on the Rights of the
Child. As Figure 4.5 demonstrates, the full range of children's needs–rights could not be met for child victims, even with the introduction of most progressive reforms. As the blue unrounded circles demonstrate, the various needs–rights are addressed in the criminal process at varying (yet always unsatisfying) levels.

Perhaps the area where adversarial criminal justice systems score the highest mark is protection. This is not surprising as preventing crime and protecting the general population is probably the ultimate goal of the criminal mechanism. Indeed, despite significant difficulties at all stages of the process (in particular reporting and proving some types of crime, and even more so with regard to children with disabilities), there is no other mechanism at present that provides a systemic response to childhood victimization, and the criminal justice system is still the best known mechanism of reporting, responding and preventing crimes against children. Therefore, even if the criminal justice system is only partially effective and clearly needs to improve in this regard, it is still the best alternative at present.

The criminal justice process has also improved remarkably in the last two decades in protecting child victims against the emotional harms associated with the process itself. In many jurisdictions far reaching reforms have been introduced that include the use of videotaped testimony and the use of CCTV or screens during children’s live testimony, court preparation, support persons, expedited proceedings, interagency cooperation, and adjustments of the courtroom environment. Jurisdictions differ in the comprehensiveness of their reforms as well as in their implementation, but there is certainly a trend toward reform globally.

Another aspect of children’s rights to be protected, however, remains neglected in the current system: some types of violence still harm children on a daily basis, such as sibling assaults, parental corporal punishment and school bullying, without being effectively addressed (Finkelhor et al. 2005). Indeed, it might be argued that these types of violence and domination are not suitable for the criminal process. However, in evaluating the extent to which the criminal justice process protects children against violence, these data should be considered.

If children’s right to protection is somewhat addressed through the criminal process, then other needs–rights of child victims are often neglected, if not abandoned altogether. As the analysis in this chapter shows, typically adversarial criminal justice systems do not put the child’s best interests at the center. Indeed, this is true for all victims, who are peripheral to the system’s modus operandi. This is perhaps why the victims’ rights movement was so successful in communicating the system’s failures. However, since states are bound by the Convention on the Rights of the Child to give primacy to the individual interests of every child in matters concerning him or her, the failure of the criminal process to give considerable weight to children’s wellbeing (and of course, when acting directly against these interests) — is even more disturbing.

Further, this chapter shows that children’s participation in the process is non-existent in many cases, limited in others and often tokenistic. It is reasonable to maintain that, in psychological terms, the criminal process is an ‘uncontrollable’ situation (see page 64). While being in an uncontrollable situation is difficult, even more emotionally taxing is engaging in ‘primary control’ coping (trying to influence
Figure 4.5: A needs–rights evaluation: shortcomings of the criminal justice process
the situation), expecting high controllability, when in fact the situation is not contingent upon the child’s actions. In other words, the use of VIS with children might cause more harm than good when their perspectives are not seriously considered by decision-makers.

Similarly, adversarial criminal justice processes do not meet specific developmental needs of child victims of various ages, do not take any measures to promote their psychological recovery and social reintegration, and fail to give special attention to children with specific needs or who belong to marginalized populations.

Analyzed through a needs–rights perspective, it becomes clear that some elements of the criminal process cannot be changed. In Roach’s words, ‘no one has yet managed to develop a victim centered model which is also consistent with due process or crime control’ (1999, p. 707). The criminal justice process in adversarial legal systems is adult– and offender–oriented. It is aimed at establishing guilt or innocence and deciding on the appropriate punishment when guilt is proved. With the threat of being sent to jail or having to endure other financial or social penalties, defendants and defence attorneys use any tactic to deny responsibility and reduce the victim’s credibility. There is limited room for open, genuine communication between the victim and the offender, who are placed on opposite sides of the competition. There is very little room for apology and remorse, compassion and reintegration. At the same time, fears from the expected results of either punishment or acquittal, combined with fears regarding the process itself, inhibit many children and their parents from reporting the crime and cooperating with the police.

At its best, the crime control model provides indirect recognition of victims without empowering them (Roach 1999). Indeed, the criminal process cannot, by definition, meet all the needs of victims, and some argue that it should not (Groenhuijsen 1994, p. 174).

However, the needs–rights framework also uncovers elements in the criminal justice process that can be improved. For instance, it identifies the need for greater flexibility and adjustments of special measures for children with disabilities. It also demonstrates the need for greater emphasis on consultation with young victims regarding the way they will testify and other protective measures. Lastly, it points to the importance of listening to children regarding the form of compensation they wish to receive. Indeed, using a needs–rights approach can arguably make criminal justice systems more child–friendly even if they could never meet the full scope of children’s needs–rights. The following are two examples of the implementation of a human rights based approach toward child victims within the criminal process.

UNICEF’s guide on children in international criminal justice mechanisms reflects the Convention’s provisions, and focuses in particular on the best interest of the child, participation and rehabilitation principles (International Criminal Justice and Children 2002, p. 16). According to the guide, the individual circumstances of each child, including their age, gender and wishes, should be considered at every stage, including the appointment of representatives (2002, p. 16). To promote participation of children, justice mechanisms make accessible aids to make the child’s testimony easier and less stressful, such as support people sitting by the child witness, CCTV and the use of screens. Every child however should be consulted prior
to the testimony to ensure that the measures meet his or her specific needs and wishes (2002, p. 39). The guide further stresses that to allow children to make an informed decision regarding their participation, they should be fully informed about the process, its goals and their rights in it, and their views should be heard and carefully considered (2002, pp. 52–53). Justice regimes are urged to protect children against harm and to promote their rehabilitation (2002, p. 49). Since rehabilitation needs to take place in an environment that ‘fosters the health, self respect and dignity of the child’ as the Convention stipulates, procedural rules should protect children against harm and humiliation. In particular, rules should protect children during cross examination (2002, p. 50).

Indeed, the Rules of Procedures and Evidence for the International Criminal Court (ICC) state that in performing their functions, organs of the court ‘shall take into account the needs of all victims and witnesses... in particular children, elderly persons, persons with disabilities and victims of sexual or gender violence’ (International Criminal Justice and Children 2002, p. 84, Rule 86). Examples of special measures are hearings behind closed doors, the use of live link television or recorded testimonies, the duty of the court to prevent harassment or intimidation of a witness, anonymity of the child, and alteration of voice or pictures to protect victims from being identified (2002, p. 85). The court may also order reparation for the victim for damage, loss or injury. There are special arrangements for the representation of child victims (2002, p. 86). The ICC organs include a victim and witnesses unit that provides protective measures, counselling and other assistance for victims (2002, p. 86). The ICC is designed to be child–friendly. A staff requirement is for some judges to have a legal expertise on children. Similar expertise requirements apply to advisors to the prosecutors and the victim assistance unit. All staff members need to go through training on child–related issues (2002, pp. 92–93).

A second example of a human–rights based approach toward child victims is the International Bureau for Children’s Rights’ standards for treatment of child victims and witnesses, which were adopted by the Economic and Social Council of the UN (Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime 2005). These standards are based on the Convention as well as other UN documents. The general principles on which the standards build are those of dignity for all children, non-discrimination, best interests of the child as a primary consideration, protection, harmonious development, and the right to participation. The document recommends that all proceedings should take place in a child–sensitive and empathic manner, in an environment suitable for the child and in a language that the child understands (Article 14). With regard to the right to equality, the standards state that all child victims and witnesses should have access to a justice process and support services. These mechanisms should be sensitive to the specific condition and status of the child and their special needs (Article 15, 16).

Importantly, age should not be a barrier for the child from participating in the process according to the document (Article 18). Further, children should be well informed and allowed to express their views freely regarding all matters related to the process, including their participation in it, their safety, and their preferred outcomes (Article 20). The standards further advise that child victims should receive
assistance from support persons starting from their report of the crime and until such assistance is no longer required (Article 25). Continuity in the ongoing assistance provided for the child throughout the process is required, as well as maximum certainty regarding what the child should expect, in order to prevent unnecessary hardships (Article 31). To promote the right to safety, staffs are urged to be trained in recognizing threats of intimidation and stress on child victims and in preventing them. Recommended safeguards include avoiding direct contact with the accused, the use of court ordered restraining orders when needed, using pre-trial detention to prevent threats and ‘no contact’ bail conditions, or house arrest (Article 35).

It seems, then, that there is much room for improvement in the criminal process, in the directions that many reforms have already taken. However, even in child–friendly frameworks, such as the two discussed above, some aspects of the criminal justice process will not change, since it is based on fact finding and punishment. These are in conflict with the needs of all victims, but perhaps child victims in particular, to tell their stories in their own terms, have their harms acknowledged, receive an apology from the offender, and experience a sense of control and empowerment during the process.

Is there another option, one that is able to meet the needs and rights of both victims and offenders, without jeopardizing any of them, an alternative that can protect child victims and at the same time respect their human rights? The next chapter explores the restorative alternative, in which, at least theoretically, offenders are held accountable while at the same time victims’ needs and basic human rights are promoted. If restorative justice offers a valid alternative, then the impossible dilemma between retribution (at the cost of exposing children to stressful, traumatic and degrading proceedings and the possibility of family breakdown) and protection (at the cost of giving up any denunciation of the crime)— might become unnecessary.